MIRZA FAROUK BEG MUTHI AHMAD

v.

VAJI BEG MUTHI AHMAD

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CIVIL SUIT NO. 379 OF 1976]
14 AUGUST 1986

CIVIL PROCEDURE: *Consent Order - Partition of property - Application by plaintiff to partition land equally and expenses to be borne equally by the parties - Defendant opposed the application - Order 3 r. 6 of Rules of the High Court 1980 - Defendant alleged that consent order made without his instructions and therefore not binding on him - Whether consent order still binding.*

The parties in the instant suit are brothers. They owned jointly several pieces of properties. There were squabbles among the brothers which resulted in the plaintiff bringing this suit against the defendant in 1976. The dispute however culminated in a Consent Judgment being entered on 16 January 1978. One of the orders in the said Consent Order read "... that all the property known as ... for Lot 551 in the Mukim of Jelai be partitioned equally between the parties..."

On 6 November 1985 the plaintiff applied by way of summons-in-chambers to partition the land Lot No. 551 equally. The defendant (who in the meantime had changed solicitors) opposed the application. He contended that on 12 January 1978 both he and the plaintiff had executed a Memorandum of Mutual Consent as to the sharing of the said land. The defendant also contended that the plaintiff was not entitled to make his application without complying with O. 3 r. 6 of the Rules of the High Court 1980. Defendant also opposed the plaintiff's application on the ground that the Consent Order dated 16 January 1978 was made without his instructions and was therefore not binding on him.

Held:

[1] The Memorandum of Mutual Consent between the parties was executed on 12 January 1978. The Consent Judgment was entered on 16 January 1978. The Consent Order embodied, *inter alia*, the terms of the Memorandum of Mutual Consent. It therefore could not be said that the Consent Order was not valid because of an earlier agreement. It should be the other way round. What more, the draft of the Consent Order was approved and solicitors for both parties appeared before the Honourable Judge for the Consent Judgment to be entered.

[2] On the contention by the defendant that he was not a party to the Consent Order, it is clear law that a solicitor once retained by a party, has full authority to act on behalf of that party and this authority extends to negotiations for settlement, including implied authority to compromise an action. No limitation to this implied authority can be relied upon as against the other party unless such limitation was brought to the notice of the other party before the compromise was arranged.

[3] The defendant's former solicitor through his lawyers had written a letter to the defendant denying that the Consent Order was entered without the defendants consent. In fact the defendant's former solicitor, in no uncertain terms, refuted the defendant's allegation that he had not given his approval to the Consent Order being entered, and even categorically stated that what the defendant was alleging amounted to libel.

[4] The defendant moreover had not applied even up to the date of the hearing to set aside the Consent Order. Since it had not been set aside, it was still binding.

[Application by plaintiff allowed.]

Cases referred to:
Welah v. Roe [1918] 118 LTR 529
Yap Chee Meng v. Ajinomoto (Malaysia) Berhad [1978] 2 MLJ 249
Kinch v. Walcott & Others [1929] AC 482
Waugh & Others v. H.B Clifford & Sons Ltd. & others [1982] 1 All ER 1095

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 6

For the plaintiff - K. Gunaretnam; M/s. Gunaretnam & Co.
For the defendant - A.K.J. D'Cruz; M/s. A.K.J.D'Cruz & Co.

JUDGMENT

Mustapha Hussain J:

The parties to the Suit herein are brothers. While the defendant is married with children, the plaintiff though married has no issues. Both the plaintiff and defendant are old and the plaintiff though younger, is quite sick and according to his affidavit, if he passed away, his wife will only derive one-third of his property, the other two-third going to his two brothers, one of whom is the defendant. (see plaintiff's affidavit dated 14 April 1986 encl. 10).

The brothers owned jointly several pieces of properties. There were squabbles among the brothers which resulted in the plaintiff bringing this Suit against one of the brothers in 1976. The dispute however culminated in a **Consent Judgment** being entered on 16 January 1978 (see Exhibit A to encl. 1). One of the orders in the said Consent Order read:

> **And it is Further Ordered that all that property known as Certificate of Title Number C.T. 5379 for Lot 551 in the Mukim of Jelai be partitioned equally between the parties hereto the details whereof to be worked out by their respective solicitors,...**

This was way back on 16 January 1978. The Court file relating to this case was burned together with other files when the High Court building in Seremban caught fire in June 1984. The file has now been re-constructed.

On 6 November 1985 the plaintiff applied by way of Summons-in-Chambers to partition the land Lot No. 551 equally (see proposed partition plan Exhibit A to encl. 1) which was backed up by a valuation report (Exhibit B to encl. 1)

In this application, the plaintiff had asked that both the parties jointly apply through Jurukur Semenanjong, a firm of surveyors, to partition their joint land equally and expenses to be borne equally by the parties, all in accordance with one of the orders of the Consent Judgment mentioned above.

The defendant (who in the meantime changed solicitors) opposed the application (encl. 6) saying that on the **12 January 1978** both plaintiff and defendant had executed a Memorandum of Mutual Consent whereby both of them shall share the said land equally. The Memorandum was exhibited on p. 1 of encl. 7. The defendant also contended that the plaintiff was not entitled to make this application without complying with O. 3 r. 6 of the Rules of the High Court 1980.

Defendant's third ground of opposing the plaintiff's application was that the Consent Order dated 16 January 1978 was made without his instructions and therefore not binding on the defendant (see encl. 6).

Defendant also alleged that on 9 November 1981 he and the plaintiff executed an agreement demarcating the said land and again on 12 January 1983 both he and the plaintiff appointed Serting Consultants Sdn. Bhd. to develop the land.

In reply, the plaintiff filed several affidavits explaining and rebutting the defendant's allegations.

The Court took time to consider the various matters raised, some of which were procedural, some legal and some petty.

Court's findings:

First on the preliminary point raised by the defendant whether the plaintiff after more than one year had to comply with O. 3 r. 6 of the Rules of the High Court 1980. It is worthy to note that the word "proceeding" in the rule refers to interlocutory proceeding before final judgment. This rule is intended to prevent surprise and catch the other party unprepared. Anyway, the Consent Order under which the plaintiff was making the application, was not an interlocutory proceeding but a final judgment. The Court therefore overruled the defendant's preliminary objection and ordered the arguments on the application to proceed.

The Memorandum of Mutual Consent between the parties was executed on 12 January 1978. The Consent Judgment was entered on 16 January 1978. The Memorandum of Mutual Consent read as follows:

> We, Mirza Vaji Beg bin Muthi Ahmad and Mirza Farouk Beg bin Muthi Ahmad, co-owners of Aziz Estate, and 4 houses at Temiang Road, Seremban, do hereby agree that the defendant Mirza Vaji Beg bin Muthi Ahmad will pay 70% of the debts and the plaintiff Mirza Farouk Beg bin Muthi Ahmad will pay 30% of the debts that are pending on the properties, and that after the debts are settled, **the property will be divided equally among both within a year.** Meanwhile the income derived from the properties will be shared equally among them. (The emphasis is mine)

On 16 January 1978 (four days of the Memorandum of Mutual Consent) the Consent Order was made. It is to be noted that the Consent Order embodied, *inter alia*, the terms of the Memorandum of Mutual Consent executed by the parties four days earlier. It therefore could not be said that the Consent Order was not valid because of an earlier agreement. It should be the other way round. The draft of the Consent Order was approved and solicitors for both parties appeared before the hon'ourable Judge for the Consent Judgment to be entered.

On the contention that both parties had taken steps to develop the land in question, since such steps taken did not bear any fruits, this action by the parties cannot invalidate or prejudice their various rights to their lands. Even though both the plaintiff and the defendant did sign the proposed development plans, since the plans did not materialise, the parties were back to square one, to their original rights.

Lastly, on the contention by the defendant that he was not a party to the Consent Order, it is clear law that a solicitor once retained by a party, has full authority to act on behalf of that party and this authority extends to negotiations for settlement, including implied authority to compromise an action. No limitation to this implied authority can be relied upon as against

the other party unless such limitation was brought to the notice of the other party before the compromise was arranged. (See *Welah v. Roe* [1918] 118 LTR 529 cited in the case of *Yap Chee Meng v. Ajinomoto* (*Malaysia*) *Berhad* [1978] 2 MLJ 249.)

The defendant's former solicitor through his lawyers Messrs. Chan & Chia had written a letter to the defendant (see encl. 8, a copy of which was extended to the Court) denying that the Consent Order was entered without the defendant's consent. In fact the defendant's former solicitor, in no uncertain terms, refuted the defendant's allegation that he had not given his approval to the Consent Order being entered, and even categorically stated that what the defendant was alleging amounted to libel.

The defendant moreover had not applied even up to now, to set aside the Consent Order. Since it had not been set aside, it is still binding. (See *Kinch v. Walcott & Ors.* [1929] AC 482).

Defendant was bound by the Consent Order as against the plaintiff. Defendant may have his remedy elsewhere. (See *Waugh & Ors. v. H.B. Clifford & Sons Ltd. & Ors.* [1982] 1 All ER 1095).

Coming to the crux of the application. What was the plaintiff really asking for? The said land was being jointly held by the plaintiff and the defendant in equal shares. Since there had been a lot of bickerings and illwill between the brothers, one of the brothers was asking that the land be divided equally between them so that each can take his share and go his own way.

The application in no way prejudiced the defendant at all. According to the application the expenses incurred were to be shared on equal basis. The Court found no merits in all these attempts to oppose the application. Why the defendant is strenuously opposing the plaintiff from taking plaintiff's rightful and lawful share beats one's imagination. Or is the defendant playing for time for his sick brother to pass away so that that part of plaintiff's estate will devolve to him?

The Court therefore allowed the application for division as prayed, so that after so many years of feud and bad feeling, each party can go his way and live in peace, without being entangled with his brother.

Also found at [1986] 2 CLJ 253